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Opinion of Examiner of Interstate Commerce Commission in Joint Hearing in the Proceeding at Bar.....III–XXX

In The
Supreme Court of the United States

October Term, 1942

No.....

NEVADA CONSOLIDATED COPPER CORPORATION,
NEVADA NORTHERN RAILWAY COMPANY, and
KENNECOTT COPPER CORPORATION,

Petitioners,

vs.

RAILROAD RETIREMENT BOARD,
RAILWAY LABOR EXECUTIVES ASSOCIATION, and
BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners pray that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, entered July 27, 1942, rehearing denied August 11, 1942.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Tenth Circuit, (R. 433) is reported in 129 Fed. (2d) 358. The opinion of the District Court of the United States for the District of Colorado (R. 80) is reported in 41 Fed. Supp. 763.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 27, 1942 (R. 442). A petition for rehearing was denied August 11, 1942, (R. 451). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Certain workers are hired and paid by a copper mining company to haul its ore in its ore trains from the mine to its reduction works for processing. The ore is transported over railroad tracks owned by a carrier, under a trackage license granted in 1920. To comply with regulatory statutes and rules enacted by national and state authorities, and in the interest of practical efficiency, economy and coordination, the workers engaged in the ore haulage have been subjected to the carrier's general supervision and direction. But the ultimate power to hire and discharge these ore haul workers rests with the mining company.

Are the ore haul workers employees in the service of the carrier for compensation within the meaning of the Railroad Retirement Act?

STATUTE INVOLVED

The pertinent provisions of the Railroad Retirement Act of 1937, as amended, 50 Stat. 307, 54 Stat. 264, 785, 786, 1100, 45 U.S.C. Sec. 228a, are as follows:

> "(a) The term 'employer' means any carrier (as defined in subsection (m) of this section), * * * and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer * * *"

"(b) The term 'employee' means (1) any individual in the service of one or more employers for compensation, (2) any individual who is in the employment relation to one or more employers, and (3) an employee representative. The term 'employee' shall include an employee of a local lodge or division defined as an employer in sub-section (a) only if he was in the service of or in the employment relation to a carrier on or after the enactment date."

"(c) An individual is in the service of an employer whether his service is rendered within or without the United States if he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, which service he renders for compensation: * * *"

* * *

"(h) The term 'compensation' means any form of money remuneration earned by an individual for services rendered as an employee to one or more employers, or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost."

* * *

"(l) The term 'employee' includes an officer of an employer.

"(m) The term 'carrier' means an express company, sleeping-car company, or carrier by railroad, subject to Chapter 1 of Title 49."

STATEMENT

The petitioner, Kennecott Copper Corporation, owns a large open pit copper mine situated at or near Ruth, Nevada, six miles westerly of Ely, and a mill and smelter at McGill Nevada, about twenty-two miles easterly from Ruth and sixteen miles easterly from Ely. These properties are operated by the petitioner, Nevada Consolidated Copper Corporation,

which is a managerial and operating agent and a wholly owned subsidiary of Kennecott Copper Corporation. (R. 190, 192, 193) The petitioner Nevada Consolidated Copper Corporation, the agent, and Kennecott Copper Corporation, the principal, and the latter's predecessors in interest in the title to the mining property, are hereinafter referred to indiscriminately as the "Mining Company". The petitioner Nevada Northern Railway Company, hereinafter called the "Carrier", is a common carrier. It owns and operates a line of railroad from Cobre, Nevada, on the line of the Southern Pacific Company, south approximately one hundred thirty-five miles to Ely, Nevada, and also from Ruth over the distance of twenty-two miles to McGill. (R. 189) The Carrier was organized and the railroad was built to provide transportation between the plant of the Mining Company and the transcontinental railroads for materials and supplies required by the industry and for its product out to the refineries on the eastern seaboard and the market. (R. 251) The railroad reached Ely in 1907, and in 1908 the first blister copper was produced in the treatment plants. The outstanding stock of the Carrier has been owned by the Mining Company always. (R. 189)

The Mining Company has carried on two types of mining, (1) an underground mine at Ruth, and (2) an open pit or surface mine in the same vicinity. In the first operation the ore is broken down by a caving method and hoisted vertically through a shaft to the surface, where it is loaded into standard railway cars and hauled a short distance to the assembly yard at the entrance to the open pit mine. In the second operation, the ore is loaded into cars by power shovels in an open pit and hauled out of the pit to the assembly yard. (R. 190-191) The cars, loaded with ore, are hauled from

the assembly yard in 24 to 32 car trains the distance of twenty-two miles to McGill, where the reduction plants are located. (R. 193) The pit crews bring the cars up out of the pit, set them in the assembly yard, and make them up into trains, along with the cars of ore from the underground operation. (R. 34, 35, 45, 46, 190, 209) The ore delivery crews haul the trains to McGill, where they are left in the concentrator ore yard, and an electric locomotive then picks them up in trains of 12 or 14 cars and delivers them to the concentrator, from which the concentrates are handled to the smelter by still other locomotive crews of the Mining Company. From the smelter the blister copper is moved in cars to the yard of the Mining Company near the depot of the Carrier, where the bars of blister copper are loaded into box cars, foreign cars furnished the Mining Company at this point by the Carrier. These loaded box cars are then made up into trains by the Carrier's crews and are hauled away to connections with transcontinental railroads, under the Carrier's published tariffs and as a part of the Carrier's common carrier operation. (R. 213, 214, 215)

The tracks in the pit and in the plant yards at McGill are owned by the Mining Company, but the tracks in the assembly yard at the pit and thence to McGill are owned by the Carrier. (R. 211) All of the locomotives, engines, cars and equipment used in the movement of ore in the mine and from the mine to the point of delivery of blister copper to the Carrier are owned by the Mining Company. The ore movement over the tracks of the Carrier since September 1, 1920 has been pursuant to a trackage license (Ex. 18E, R. 195, 323) granted the Mining Company by the Carrier, and none of the material moved has come into the Carrier's possession until delivery

by the Mining Company to the Carrier of the box cars loaded with blister copper for shipment to the refineries. (R. 192, 193, 196, 197, 209, 211) Prior to September 1, 1920 the ore was transported from the mine to McGill by the Carrier under its published tariffs. (R. 218) After September 1, 1920, when the trackage license went into effect, the work performed by the ore delivery crews in the hauling of ore from mine to the plant yards at McGill has been the work of the Mining Company. (R. 210, 273) When that change took place the Mining Company purchased the cars and engines that had been used by the Carrier in the ore haulage, and the workers who had been therein employed by the Carrier were employed anew by the Mining Company, and were thereafter paid by the Mining Company. (R. 206, 219, 270, Ex. 23E, R. 202, 360, Ex. 29E, R. 283, 382, 269).

Under the trackage license effective September 1, 1920 (Ex. 18E, R. 195, 323) the Mining Company was granted the right to transport the ore over the line of the Carrier, which license was to be exercised in harmony with the conduct by the Carrier of its common carrier operation and with the operations of others to whom similar licenses might be granted (R. 324) The agreement provides that the Mining Company "will itself perform its interindustry service of transporting its" ores from mine to reduction works; that the Mining Company should assume the risk of damage to itself and to third persons suffered in the Mining Company's operations upon the Carrier's tracks; that each party should save the other harmless from loss caused by the negligence of its employees; that in case of collision between their respective engines, cars or trains, the party whose employees were alone at fault should be solely responsible; (R. 325) that in case any of the

trains of the Mining Company should be wrecked while running on the Carrier's tracks under this license, the wreck should be picked up and moved by the Carrier at the Mining Company's cost, etc. And it was further provided that the Carrier should dispatch the trains of both parties; that the trains of the Carrier should be given precedence over the trains of the Mining Company; that all time cards, rules and regulations promulgated by the Carrier for the movement of trains should be reasonable and without unreasonable preference in favor of the Carrier as against the Mining Company, but that the Carrier's obligations to the public as a common carrier were paramount. (R. 327) And it was provided that the Carrier should be compensated by the Mining Company for the latter's use of the Carrier's tracks by payment to the Carrier on a wheelage basis calculated as in the agreement provided; that all expenses connected with the operation of stations and yards, wages of gatemen, towermen, signalmen, switchmen, train dispatchers, telegraph operators, etc., and such proportion of the general and other expense of maintenance and operation of the Carrier's line of railroad as were properly chargeable to that portion thereof over which the Mining Company operated under this license, should be divided between the parties on the basis of their use respectively, based on loaded and empty car mile movement. (R. 332) And it was the clear intent and purpose of that trackage license agreement and of the parties thereto that each should have its own set of employees and by them operate its own trains and perform its own work.

The average annual percentage of the Mining Company's tonnage hauled over the tracks of the Carrier to the total tonnage handled over those tracks, for the years 1910 to and

including 1939, varied from a low of 97.72% in the year 1930 to 99.48% for the year 1936. Included in Mining Company's tonnage was not only that of the ore moved under the trackage license, but all other tonnage of the Mining Company moved as commercial freight under the Carrier's published tariffs and not within the provisions of the trackage license. (R. 276-277)

The trackage license went into effect September 1, 1920, and since that time the personal records of the workers engaged in the ore haulage have been made up and preserved upon the Mining Company's standard forms. Their physical examinations have been made by the Medical Department of the Mining Company. Such supervision and direction as has been exercised by the Carrier over them has been at the instance of the Mining Company in the course of Mining Company's work, and the Carrier has supplied such supervision as the agent of the Mining Company, and the Carrier has been paid by the Mining Company for that service. (R. 198-209, 257-263, 264, 265) Since the trackage license's effective date the workers engaged in the ore haul never have been granted free or reduced transportation privileges, such as have been afforded the employees of the Carrier. (R. 252, 270) The Carrier has borne no portion of the expense due to accident or illness of the ore haul employees or their families, and such expense has been borne by the Mining Company. As to seniority, the workers in the ore haul have been separately listed, having their own seniority list as employees of the Mining Company, and the Carrier has kept and posted a seniority list for its employees only. No discharge by Carrier officials of workers in the ore haul has or could become final until Mining Company's General Man-

ager had concurred, and such was the procedure followed by Mining Company in the discharge of employees engaged in any other of Mining Company's operating departments. The employees in the ore haul have borne the same relation to Mining Company as any other employees of Mining Company in the mine or reduction works. (R. 264-272, 292, 293) All workers in the ore haul, like all other employees of Mining Company, whether at the mine, at the mill or at the smelter, have been reported as employees of the Mining Company to the Nevada State Industrial Commission and as Mining Company employees they have received the protection from this institution that is provided by law. (Nevada Industrial Insurance Act, Vol. 2, Nevada Compiled Laws 1929, §2680, et seq.) The workers in the ore haul have been reported by Mining Company under the Federal Social Security Act, (42 U.S.C. §301, 49 Stat. 620, 26 U.S.C. §1400 et seq.) and Mining Company has paid the tax and has deducted from the wages of those workers the percentage required by that Act. And the workers in the ore haul have been reported as subject to the Fair Labor Standards Act of 1938 (29 U.S.C. §§201-219) and their hours of employment have been limited to the statutory time prescribed by that Act. (R. 208, 209) The workers engaged in the ore haulage are employed by Mining Company only, and increase and reduction in force has been made pursuant to the direction of Mining Company. (R. 210, 211, 229-230, 264) The workers in the ore haul have at all times conducted themselves unequivocally as employees of the Mining Company and not as employees of the Carrier. All discharges of such employees have been referred to the Mining Company's General Manager and by his action only have they become final. The workers in the ore haul, entitling

themselves as employees of the Mining Company, have directed grievances to the local Union of the International Union of Mine, Mill and Smelter Workers, and to the General Manager of the Mining Company instead of and as distinguished from an official of the Carrier, and as employees of the Mining Company have sought preferential treatment, and have reported to the General Manager of the Mining Company upon the condition of equipment used in the ore haul and have transacted their business with Mining Company's General Manager as distinguished from an official of the Carrier. The Mining Company has at all times possessed and exercised the ultimate and final control of the workers engaged in the ore haulage and the fact that such ultimate and final control reposed in Mining Company and not in the Carrier was known and clearly understood by those workers. (R. 281-292, 305-308)

The extent to which the Carrier has exercised supervisory authority over the workers in the ore haulage has been only that which has been customary for the owning carrier to exercise over a licensee upon the carrier's tracks. (R. 265, 266, 267) Such supervision is necessary to avoid violation of the regulatory acts and rules imposed by national and state authority,* and to adequately protect the owning carrier in the latter's performance of its duty to the public.

*Under the Accident Report Acts of May 6, 1910, U.S.C. Title 45, Section 38, the carrier is required to make to the Interstate Commerce Commission full and complete reports of all accidents and to submit to investigations thereof by the Interstate Commerce Commission. By the Ash Pan Act of May 30, 1908, U.S.C. Title 45, Section 17, it is made unlawful to use on the common carrier tracks any locomotive not equipped with an ash pan that can be dumped or emptied and cleaned otherwise

(Continued on page 11)

Over the past twenty-two years the trackage agreement and its application, the charges made thereunder and the apportionment of them, have been the subject of careful consideration by the representatives of the Interstate Commerce Commission, and the agreement, as well as the operation thereof, has been approved in all respects. (R. 273, 274, 260, 299)

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than by employees going under such locomotive. By the Boiler Inspection Act of February 17, 1911, as amended June 7, 1934, U.S.C. Title 45, Section 22, the carrier is required to equip its locomotives with safe and suitable boilers and appurtenances and the carrier is denied the right to permit to be used on its lines any locomotive unless the same, its boiler, tender and all parts and appurtenances thereof, are in proper condition for safe operation; and it is further required by that Act that such locomotives, boilers, tenders, parts and appurtenances must be inspected from time to time and be able to withstand the tests prescribed by the rules and regulations of the Interstate Commerce Commission. By the Hours of Service Act of March 4, 1907, as amended, U.S.C. Title 45, Section 61, it is made unlawful to permit any men to be or remain on duty on the Railway Company's common carrier tracks for a longer period than 16 consecutive hours, etc. By the Safety Appliance Act of March 2, 1893, as amended, U.S.C. Title 45, Section 1, it is required that all cars operated over common carrier tracks must be equipped with automatic couplers and continuous brakes and with other appurtenances deemed necessary to the safe handling of cars and locomotives. By Title 49, U.S.C. Section 26, as amended, it is provided that each carrier shall install upon its railroad such safety devices as the Interstate Commerce Commission shall order to promote the safety of railroad operation, and each carrier is required to formulate and file with the Commission its rules, standards and instructions for the installation, inspection, maintenance and repair of such safety devices, the same when approved by the Commission to become obligatory upon the carrier. And each carrier is required to report to the Commission, failure of such safety devices upon its line of railroad.

(Concluded on page 12)

On June 20 and 21, 1939, a joint hearing was held at Ely, Nevada, before an examiner of the respondent Board and an examiner of the Interstate Commerce Commission, this with relation to workers engaged in the ore haul conducted by the Mining Company over the tracks of the Carrier between Ruth and McGill, Nevada. The respondent's examiner was authorized to determine whether the employees were subject to the Railroad Retirement Act, and the examiner of the Interstate Commerce Commission was directed to determine whether they came within the definition of "employee" in the Railway Labor Act as amended. (44 Stat. 577, 45 U.S.C. §151)* The respondent Board concluded that

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By Section 6357.01, Nevada Compiled Laws 1929, supplement 1931-1941, a carrier may not permit to be operated over its line of railroad a train of cars of greater number than that thereby prescribed. By Section 6134, Nevada Compiled Laws 1929, as amended 1937, provision is made for the reporting to the Public Service Commission of accidents occurring on the carrier's railroad. By Section 6117, Nevada Compiled Laws 1929, the Public Service Commission is empowered to require the carrier to install safety appliances, equipment and improvements. By Nevada Compiled Laws 1929, Sections 6318, 6319, 6320, 6322, it is made unlawful for the carrier to operate or to permit to be operated on its railroad any trains with less than the specified full crews. By Section 6332, Nevada Compiled Laws 1929, every carrier is required to install upon each locomotive operated on its line a headlight of stated specifications. By Section 6335, Nevada Compiled Laws 1929, it is made unlawful for a carrier to permit stated employees to remain on duty for a longer period than that stated. By Section 6276, Nevada Compiled Laws 1929, it is required that a bell of stated weight be placed on each locomotive and be rung at a stated distance from each crossing under penalty for neglect to be paid by the carrier owning the railroad.

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*The examiner for the I.C.C. held that the ore haulage workers were not employees of the Carrier, but were employees

(Concluded on page 13)

the Mining Company at all times had been engaged in a commercial mining business, that it had not operated as a carrier by railroad subject to Part I of the Interstate Commerce Act, (R. 40, 41) but that since September 1 ,1920, the workers engaged in the ore haulage conducted under the trackage license effective upon that date, for which services they had been compensated by the Mining Company, "have been subject to the continuing authority of the Nevada Northern to supervise and direct the manner of rendering such service" and that "such individuals have been 'in the service of' the Nevada Northern with respect to such service within the meaning of the Railroad Retirement Acts of 1935 and 1937"; that "accordingly, such individuals are and have been 'employees' of the Nevada Northern with respect to such service within the meaning of the Railroad Retirement Act of 1937, and they have been 'employees' of the Nevada

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of the Mining Company. To preserve the discussion of the examiner for the I.C.C. his report is set out at length in the appendix hereof. Exceptions to the Examiner's Report were taken by the Brotherhood of Locomotive Engineers and the Brotherhood of Railroad Trainmen. Division 3 of the I.C.C., Commissioner Patterson dissenting, dismissed the Brotherhoods' exceptions on the ground that the Commission had no jurisdiction to determine whether the workers were in the employment of the Carrier or the Mining Company. (246 I.C.C. 757) The Brotherhoods filed a petition for rehearing and reargument before the entire Commission, and the Commission has set the case for reargument on October 19, 1942. The definitions of "employee" in the Railroad Retirement Act and the Railway Labor Act are substantially identical. If the Commission persists in its well-settled policy of refusing to determine whether certain employees are within the Railway Labor Act (245 I.C.C. 415, 246 I.C.C. 703) or if it confirms the report of its examiner, there will exist a conflict with respect to the status of these employees.

Northern within the meaning of the Railroad Retirement Act of 1935 . . .". (R. 41)

On February 19, 1941, the petitioners filed in the United States District Court for the District of Colorado their complaint (R. 7) against respondent, the Railroad Retirement Board, to compel the Board to set aside its decision on the ground that it violated the petitioners' legal rights. The District Court dismissed the action. (R. 86) The Circuit Court of Appeals for the Tenth Circuit affirmed the judgment of dismissal. It decided that the District Court had erred in holding that the decision of the Board on the question of its jurisdiction over these employees was final because supported by competent evidence. But after an independent examination of the record, the court held that the ore haul workers were employees within the Railroad Retirement Act on the ground that they were under the supervision and control of the Carrier and thus under the continuing authority of an employer within the meaning of subsection (c). (R. 441)

REASONS FOR GRANTING THE WRIT

1. The Circuit Court of Appeals for the Tenth Circuit has decided important questions of Federal law* which have not been, but should be, settled by this Court. This case and the companion Utah case are the first to raise significant

*We do not question the lower court's holding upon the scope of judicial review of the respondent's orders. We merely mention it to show that the decision below involves questions concerning the administration of an important Federal statute, which are of great concern to employers and to the Railroad Retirement Board as well.

issues of statutory construction under the Railroad Retirement Act. The meaning and application of the terms "employer" and "employee", as defined in Section 1 of the Act, not only delimit the area of its impact upon the American economy, but also determine the jurisdiction of the Railroad Retirement Board and Social Security Board. These are serious questions for many employees and employers, including the petitioners. Carriers must of necessity supervise the operations of others over their tracks. The Interstate Commerce Commission must approve licenses and trackage licenses uniformly provide for such supervision.*

Moreover, the petitioners are engaged in a desperate effort to meet the mounting demands of the war production program. The decision of the lower court upsets relationships of more than twenty years' standing which, as will be shown below, have been repeatedly sanctioned by Federal and State authority. Important executives will be compelled to divert their attention from the difficult tasks of production to study the effect of the decision upon the petitioners, particularly in the light of many Federal and State regulatory statutes, and to consideration of the adjustments or even

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*The Bureau of Finance, Interstate Commerce Commission, has jurisdiction over trackage licenses. We have been informed by the Bureau that no trackage license has been seen in which the lessor does not exercise control or supervision. See also footnote, p. 22, infra. The duty to effectively supervise the operation of others over the carrier's tracks is imposed upon the carrier as the result of the Acts of Congress and the Statutes of the State of Nevada, to which reference is supplied by the footnote at page 10, and by the further practical necessity of protecting the carrier's ability to perform its own obligation to the public.

possible reorganization which the decision may render necessary. For instance, are the ore haul workers employees of the Carrier under the Railroad Retirement Act but employees of the Mining Company for all other purposes? Are they employees of the Carrier under any other Act? Are they employees of the Mining Company for any purpose? What of the National Labor Relations Act (29 U.S.C. Sections 151-63); Railway Labor Act, as amended (45 U.S.C. Section 151); Fair Labor Standards Act (29 U.S.C. Section 201, et seq.); Federal Employers' Liability Act (45 U.S.C. Section 51, et seq.)? What of the recent order of the War Manpower Commission, 7 Fed. Reg. 7131, stabilizing employment in non-ferrous metals activities in Nevada? It seems incredible that because the Carrier has immediate supervision over the ore haul workers, it is their employer under the Railroad Retirement Act. They are also under the mediate supervision of the Mining Company. It has the final say in hiring and discharging them; it pays their compensation. Finally, these men do the work of the Mining Company — they render "service" to that company, not to the Carrier. Clearly, under the statute they are employees of the Mining Company.

2. The Circuit Court of Appeals for the Tenth Circuit has decided a Federal question in a way in conflict with the decisions of this Court. It has held that the ore haul workers are employees of the Carrier because subject to its supervision; this, despite the recognition by both the Mining Company and the workers of the fact that the Mining Company is their employer, (Ex. 23 E., R. 202, 360; Ex. 29E., R. 283, 382, 269; R. 281-292, 305-308) of the fact that the hauling of ore is by workers for the Mining Company (i.e., the service

is clearly that of the company), that the payment of the workers' compensation is by the Mining Company and of the fact that the Mining Company ultimately has the power to hire and retain or discharge. The decision of the lower court magnifies one phrase of subsection (c) and ignores completely the remainder of that subsection. Under it, to be in the service of an employer, an individual must not only be subject to his supervision, but he must be subject to supervision of "his service" by the employer, "which service" he renders to the employer "for compensation" from the employer. These additional factors are basic, not only in the Railroad Retirement Act but in other Federal Statutes.

The Federal Employers' Liability Act, 45 U.S.C. Section 51, provides that interstate railroads shall be liable "to any person suffering injury while he is employed by such carrier in such commerce" by reason of its negligence or defective equipment. This Court has held that an individual is not employed by a carrier simply because he may be subject to its supervision. Thus, in *Hull* v. *Philadelphia & Reading Ry. Co.*, 252 U. S. 475 (1920), an individual hired by one railroad was killed while on the property of the defendant's railroad tracks. Under an agreement for through traffic between the two railroads it was provided that train crews should be subject to the rules, regulations, discipline and orders of the railroad which owned the line on which they were operating. This Court held that the deceased did not become an employee of the defendant simply because he was subject to its supervision. He remained the employee of the railroad which hired him because what he did upon the line of the defendant was done as part of his duty to the other railroad which first

employed him. In *Robinson* v. *Baltimore & Ohio Ry. Co.*, 237 U. S. 84 (1915), the plaintiff, a Pullman porter on defendant's train was subject to the rules and regulations of the defendant. This Court held that he was not for that reason alone an employee of the defendant. See also *Standard Oil Company* v. *Anderson,* 212 U. S. 215 (1909); *Linstead* v. *Chesapeake & Ohio Ry. Co.,* 276 U. S. 28 (1928). For conflict with decisions of other Circuit Courts of Appeal in similar situations, *Docheney* v. *Pennsylvania Ry. Co.,* 60 Fed. (2d) 808 (C.C.A. 3, 1932), cert. den., 287 U. S. 665 (1932); *Bowman* v. *Pace,* 119 Fed. (2d) 858 (C.C.A. 5, 1941).

3. There is a contradiction between the decision of the Court below and the decisions of the Interstate Commerce Commission whereby have been construed the like provisions of the Railway Labor Act. The definitions of "employer" and "employee" under the Railway Labor Act and the Railroad Retirement Act are the same (45 U.S.C. Section 151, First and Fifth). In fact, the Interstate Commerce Commission participated in the joint hearing in the proceeding at bar under the provisions of the Railway Labor Act.

The Board and the Court below concluded that the ore haul workers were subject to the continuing authority of the Carrier to supervise and direct the manner of rendering their service, and that, hence — quite regardless of fact — that these workers are "in the service of" the Carrier, and, hence, that the Carrier is the "employer". We respectfully submit that is not what the Act provides; the Act does not attempt to define as an employment relationship one that in fact does not exist. It does not follow that merely because

the Carrier may exercise over a worker the continuing authority described, the worker is in the Carrier's service. The ore haulage here involved is not in fact a Carrier service and the compensation for the service is not paid by the Carrier. The workers therein engaged, therefore, cannot be in the service of the Carrier.

The examiner for the Interstate Commerce Commission in the proceeding at bar held that under the substantially identical provisions of the Railway Labor Act the ore haul workers are not employees of the Carrier. He said:

> "The statute here under consideration is the Railway Labor Act. In order to be a railway employee within the meaning of that Act, a worker must be in the service of a carrier. The ore-line workers are not in the service of the Nevada Northern, because the work they do is the work of the copper company. The Nevada Northern does not transport the ore tonnage, and is without authority to do so. Hence, the ore-line service cannot accurately be termed the work of a railroad employee". (Appendix, p. XX).

and again,

> "The provisions of the Railway Labor Act are of a positive and definite character. The line of demarcation between individuals who are railway employees, and those who are not railway employees, is quite sharp and clear.
>
> "To be a railway employee within the meaning of the Railway Labor Act, the worker must be in the service of a carrier. A rail carrier is defined by the Railway Labor Act as a railroad which is subject to the Interstate Commerce Act. The Nevada Northern Railway is a carrier of that type, but the copper company is not. * * * (Appendix, p. XXVI).
>
> "Inasmuch as the copper company is not a carrier, within the meaning of the Railway Labor Act,

> the only way the ore-line workers can legally be classified as railway employees is to find that they are in the service of the Nevada Northern. * * * To hold that the ore-line workers are in the service of the Nevada Northern, it must be found that the movement of the ore trains is railroad transportation service which is performed by that carrier. And it cannot accurately be said, as a matter of fact or as a matter of law, that the ore tonnage is moved by the Nevada Northern. At no time does this carrier have actual possession, or legal possession or custody of the ore tonnage. At no time does it transport, or have authority to transport that tonnage. It follows that the ore-line workers are not in the service of, and are not employees of, the Nevada Northern. (Appendix, p. XXVII).

And again,

> "Counsel for the participating parties entertain different views concerning the meaning of Section 1, paragraph 5, of the Railway Labor Act. * * * That statute provides three tests by which to identify the workers who are subject to its provisions. First, the individual must be in the service of a carrier. Second, the carrier must have continuing authority to supervise the service which the individual renders. Third, the work which the individual performs must be defined by this Commission as the work of a railroad employee or subordinate official. To be an employee within the meaning of the Railway Labor Act, an individual must pass all three tests. The ore-line workers involved in the instant proceeding are not even employees under the first test, because they are not in the service of a carrier as that term is defined by the Railway Labor Act. Nor are they railway employees within the meaning of the 1938 Fair Labor Standards Act." (Appendix, p. XXIX).

Such is the construction by the Interstate Commerce Commission of the Railway Labor Act, in Ex Parte No. 72 (Sub. No. 1), In the Matter of Regulations Concerning the Class

of Employees and Subordinate Officials to be Included within the Term "Employees" under the Railway Labor Act, Elevator Starters and Operators, and Information Clerks, Hudson & Manhattan Railroad Company, decided May 6, 1941, 245 I.C.C. Rep. 415. The Commission's interpretation of the words "in the service of", essential to the Railway Labor Act's definition of the term "employee", is the same as that of the examiner for the Interstate Commerce Commission in the proceeding at bar. To the same effect is Interstate Commerce Commission's Ex Parte No. 72 (Sub. No. 1), In the Matter of Regulations Concerning the Class of Employees and Subordinate Officials to be Included within the Term "Employee" under the Railway Labor Act, Ore Dock Foremen and Laborers, decided October 6, 1941, 246 I.C.C. Rep. 703, at 708.

The Board and the Court below lose sight of the fact that ore haulage is not a carrier service, and hence the carrier has no employees in that service. The workers engaged in the ore haulage cannot be within the provisions of the Railroad Retirement Acts.

There is further conflict between the decision below and the decisions of the Interstate Commerce Commission and of the Utah Public Utilities Commission. The Circuit Court of Appeals for the Tenth Circuit casts doubts upon the trackage agreement. But the trackage license agreement (Ex. 18E, R. 195, 323) has continued in existence over the period of twenty-two years, with the knowledge and approval of the Interstate Commerce Commission and the State Commission, and has been construed by the Interstate Commerce Commission to have established and perpetuated a purely

private industrial interplant haulage of ore by the Mining Company from Mining Company's mine to Mining Company's reduction works, that neither was, nor is, in any manner related to, or a part of any function or operation of, a carrier.* The Interstate Commerce Commission on its own motion conducted an investigation into the legality of the similar license of the same date between Bingham and Garfield Railway Company and Utah Copper Company, and the Public Utilities Commission of the State of Utah did the same thing. A hearing was held at Salt Lake City, Utah, December 14, 15 and 16, 1921, both Commissions sitting. The investigation of the Interstate Commerce Commission was discontinued October 3, 1922. 73 I.C.C. 768. The proceeding before the Public Utilities Commission of Utah was disposed of by its report of January 26, 1923 in its Case No. 466. It found that:

> "The method of operating under the agreement now under investigation in this case is as follows:
>
> "The haul between the mine at Bingham and the mills at Magna and Arthur, is performed by the Copper Company for itself, in its own cars, with its own motive power and equipment and in trains manned by its own employees and crews. During the entire movement from the mine to the mills the ore is in the possession of the Copper Company itself."

Shortly after the conclusion of its investigation of the trackage agreement, the Interstate Commerce Commission conducted hearings with relation to certain settlements claimed under Section 209 of the Transportation Act of

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*Trackage agreements similar to that here involved were made contemporaneously between Bingham and Garfield Railway Company and Utah Copper Company, and Ray & Gila Valley Railroad Company and Ray Consolidated Copper Company, 138 I.C.C. 40, 45, 59.

1920 by the carrier here, by the Bingham and Garfield Railway Company and by Ray & Gila Valley Railroad Company. 138 I.C.C. 40, (Ex. 28E, R. 275, 376), 45, 59. The Commission held that even during the period before September 1, 1920, when the railway companies hauled the ores under published tariffs as within their common carrier operation, the mine and the mills were portions of one industrial plant. Thus, the Interstate Commerce Commission not only approved its order of dismissal in 73 I.C.C. 768, but applied the same conclusion to the period prior to September 1, 1920, when the carriers hauled the mining companies' ores under their published tariffs, by the carriers' equipment, manned by the carriers' employees:

> "* * * It is apparent that the primary purpose of the carrier's line is, and since its construction has been, to serve the needs of the industry. The record shows that the ore transported by this carrier was similar to the ore transported by the Bingham & Garfield Railway Company, as described in the report upon the claim of that carrier, 138 I.C.C. 45, issued contemporaneously with this report. The reduction of the ore necessitated its removal from the mine to a point where a large volume of water was available as well as large space for the deposit of waste. In practical effect, the mine and the mill are portions of one industrial plant. * * *
>
> "Under date of May 28, 1920, the carrier and the copper company entered into an agreement to become operative September 1, whereby the copper company took over the transportation of its ore from the mines at Ruth to the reducing works at McGill. The transportation of other traffic was to be performed by the carrier as before. The carrier transferred to the copper company the equipment to be used in the ore transportation. * * *" (138 I.C.C. at 42, 43.)

Even as late at January 27, 1933, the Interstate Commerce Commission again affirmed the position previously taken by it upon this subject.

> "* * * On May 28, 1920, the respondent and the copper company entered into an agreement, effective the following September 1, whereby the copper company took over the interindustry service of transporting the ore from its mine to its reducing plant. Other transportation was to be performed by the respondent as before. * * * On brief counsel for our bureaus point out that the apparent effect of this 1920 agreement was to reduce materially the respondent's net railway operating income in subsequent years, and consequently the amounts payable under section 15a of the act, and urge that an accounting should be had for every year that this agreement has been in force with a view to determining what the net railway operating income would have been during each of the respective years had it not been in force.
>
> "This agreement was considered by us in Guaranty Settlement with Nevada N. Ry., 138 I.C.C. 40. We there held that without doubt its purpose was to reduce the net railway operating income of the respondent, thus avoiding in a measure the effect of the recapture provisions of section 15a of the act, but that the transportation of the copper company's ore from the mine to the mill should be regarded as a plant service and not as 'general transportation'. This transportation of ore which the copper company has chosen to perform itself is merely a preliminary step in the process of preparing raw material for marketable use and as such is purely a plant service. The contention of the bureau is overruled. No adjustment of net railway operating income during the recapture periods will be made in respect to this item." Nevada Northern Railway Company Excess Income, Finance Docket No. 3856, 189 I.C.C. 415, at 434.

What is the present status of these trackage licenses? Are they valid, or are they void? Must these carriers be dissolved to permit the mining companies themselves to haul their ores from mine to mills?

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

The relevant part of such statutes, as are deemed to have an important bearing upon the issues raised by this petition are as follows:

Railroad Retirement Act:

45 U.S.C. Sec. 228a:

> "(a) The term 'employer' means any carrier (as defined in subsection (m) of this section), * * * and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer * * *"
>
> "(b) The term 'employee' means (1) any individual in the service of one or more employers for compensation, (2) any individual who is in the employment relation to one or more employers, and (3) an employee representative. The term 'employee' shall include an employee of a local lodge or division defined as an employer in subsection (a) only if he was in the service of or in the employment relation to a carrier on or after the enactment date."
>
> "(c) An individual is in the service of an employer whether his service is rendered within or without the United States if he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, which service he renders for compensation: * * *"
>
> * * *
>
> "(h) The term 'compensation' means any form of money remuneration earned by an individual for services rendered as an employee to one or more

employers, or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost."

* * *

"(l) The term 'employee' includes an officer of an employer.

"(m) The term 'carrier' means an express company, sleeping-car company, or carrier by railroad, subject to Chapter 1 of Title 49."

Railway Labor Act:

45 U.S.C. §151, First and Fifth:

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to chapter 1 of Title 49, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, * * *

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: * * *

Joint Hearing with Railroad Retirement Board
INTERSTATE COMMERCE COMMISSION

Ex Parte No. 72 (Sub-No. 1)
IN THE MATTER OF REGULATIONS CONCERNING CLASS OF EMPLOYEES AND SUBORDINATE OFFICIALS TO BE INCLUDED WITHIN THE TERM "EMPLOYEE" UNDER THE RAILWAY LABOR ACT

Submitted..... Decided.....

Enginemen and trainmen paid by a copper company, and engaged in operating trains of empty and loaded freight cars, owned by that company, over tracks owned by the Nevada Northern Railway Company and used by the copper company under trackage rights, not shown to be railway employees within the meaning of the Railway Labor Act.

Frank L. Mulholland, Clarence M. Mulholland, Willard M. McEwen, E. H. Kruse, and *Eugene Morton* for petitioners and intervener.

C. C. Parsons and *W. Howard Gray* for railroad and copper companies.

PROPOSED REPORT BY EXAMINER CLAUDE A. RICE

In response to a joint petition filed on March 14, 1939, in behalf of the Brotherhood of Locomotive Engineers and the Brotherhood of Railroad Trainmen, this proceeding was instituted for purpose of determining whether certain workers who are in service on the so-called ore line of the Nevada

Consolidated Copper Corporation and/or the Nevada Northern Railway Company, are railway employees within the meaning of the fifth paragraph of section 1 of the Railway Labor Act, which paragraph is reproduced in the margin.[1] A joint hearing was held by an examiner of this Commission and an examiner for the Railroad Retirement Board. The Switchmen's Union of North America intervened. Neither the brotherhoods nor the intervener introduced any evidence.

The ore-line workers here involved are enginemen and trainmen who operate trains of freight cars, containing copper ore, from assembly yards at Ruth and Copper Flat, Nevada, near copper mines, to an interchange yard at McGill, Nevada, about 22 miles, where an ore-crushing mill and smelter are located.[2] They also move trains of empty cars in the opposite direction. The locomotives, the freight cars, the mines, the ore, the crushing plant, and the smelter are owned by the Kennecott Copper Corporation, and are operated by the Nevada Consolidated Copper Corporation as managerial agent. The latter has no assets. Herein, the two concerns are regarded as one organization and, unless otherwise noted, are

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[1]Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such orders. . . .

[2]The evidence of record indicates that assembly yards are available at both Ruth and Copper Flat, but that cars of ore tonnage are generally assembled into trains at the Copper Flat yard.

referred to singly and collectively as the copper company. The hauls from Ruth and Copper Flat to McGill are over tracks owned by the Nevada Northern, and used by the copper company under a trackage agreement which has been in force for 19 years. All train movements over the jointly used tracks are governed by orders issued by train dispatchers of the Nevada Northern, and by operating rules and regulations formulated by that carrier. The dispatching expense is apportioned monthly between the railroad and the copper company. The ore-line workers are paid semi-monthly by copper company checks. Individuals seeking employment on the ore line are examined as to physical fitness by the medical department of the copper company. If approved, they are then examined respecting their knowledge of train rules by Nevada Northern officials, and are hired by those officials. In addition, the ore-line workers are summoned for duty, when work is available, by Nevada Northern officials. The expense of examining, hiring, and supervising such workers is billed monthly and is borne by the copper company. Ore-line workers who disobey railroad operating regulations may be suspended by railroad officials from service on the ore line, and after conference with copper company officers, may be discharged unless transferred by the copper company to other duties. The brotherhoods and the intervener contend that the ore-line workers are in the service of the Nevada Northern, and are railway employees. The copper company and the Nevada Northern claim that those workers are engaged in interplant service of the copper company; that they are not in the service of the Nevada Northern, and are not railway employees.

The Nevada Northern is a class I common carrier and its

line was constructed, about 1907, primarily to provide an outlet for products of the copper mines. All outstanding railroad capital stock except directors' qualifying shares is owned by the copper company. That company and the railroad are separate corporate entities. Each has its own operating officials, and the operating officers of the one do not exercise any jurisdiction or control over the operating officers of the other.

The northern terminus of the Nevada Northern connects with a line of the Southern Pacific Company in northeastern Nevada at Cobre, and from that point the Nevada Northern main line extends southward in Nevada to Shafter, 18.5 miles, where it intersects a line of the Western Pacific Railroad Company; thence southward to East Ely, 120.6 miles; thence westward to Copper Flat, about 9 miles; thence westward to the terminus at Kimberly about 2 miles. Ruth is southward from Copper Flat 1.1 miles, and those points are connected by two rail tracks. One track is owned by the Nevada Northern, and the other by the copper company. Near Ruth the copper company owns and operates both surface and underground mines, also a series of plant tracks over which its switching locomotives, freight cars, and dump cars are moved. At McGill, plant tracks extend from the railway interchange yard to the ore-crushing mill and the smelter. Copper company employees aggregate about 1,950 of which 27 to 30 are ore-line workers; 115 serve as switching crews in the vicinity of the Ruth mines; 35 switch cars to and from the McGill crushing plant and smelter; while the remainder work in or about the mines, the mill, the smelter, or the repair shops.

Standard steel gondola-type freight cars owned by the copper company are loaded with ore while such cars are standing on plant tracks at the Ruth mines, and are then moved by

mine switching crews to assembly yards, owned by the Nevada Northern but used by the copper company under trackage rights, and are assembled by mine switching crews into trains averaging about 30 cars. The ore-line workers here involved move the trainloads of copper ore in an easterly direction over the main line of the Nevada Northern through East Ely to Hiline, 12.6 miles, thence northeastward over a branch line of the Nevada Northern to McGill, 8.7 miles. In May 1939 a total of 5,412 carloads of ore weighing about 400,000 tons was thus transported, and in the year 1938 the aggregate was 4,200,746 tons. The loads average about 70 tons per car. From the McGill yard the cars of ore are moved by copper company switching crews to the crushing plant. The branch line track between Hiline and McGill is used exclusively by locomotives and trains operated by the copper company. Shipments moved to and from McGill by the Nevada Northern are transported over another branch line which diverges from the main line at McGill Junction, 2.6 miles westward from McGill. Measured by total car miles, the copper company handles more than 98 percent of the aggregate freight traffic moved over the line which that company uses pursuant to trackage privileges. The remainder, or less than 2 percent, consists of freight which the Nevada Northern transports on tariff rates.

The Nevada Northern is largely dependent upon the copper company for freight traffic. Tons of freight transported by that railroad company on tariff rates in the calendar years 1935, 1936, 1937, and 1938 amounted to 190,704; 284,999; 345,172, and 320,552, respectively, and for that 4-year period the shipments consigned by and to the copper company accounted for 85.6 percent of the total tonnage. The other

14.4 percent consisted of mine products, shipped by several relatively small producers, and miscellaneous freight.

For several years prior to September 1, 1920, the ore produced at the Ruth mines was transported by the Nevada Northern to the McGill crushing plant on tariff rates, detailed in *Guaranty Settlement with Nevada N. Ry. Co.,* 138 I. C. C. 40, wherein it was found that this carrier's net railway operating income, for the 6-year period ended December 31, 1920, averaged about 20 percent annually on its property investment. The transportation act of 1920 authorized the Federal government to recapture from a rail carrier in any calendar year a portion of earnings in excess of 6 percent on its property valuation. To enable the Nevada Northern to avoid remitting part of its earnings to the Federal government, pursuant to the recapture provision, that carrier and the copper company entered into a contractual agreement under which the latter, effective September 1, 1920, was granted the right to operate its locomotives and cars, and to transport its ores, from certain mining areas, over Nevada Northern tracks hereinbefore described to and from the McGill yard. The copper company is specifically prohibited from transporting property owned by others. As compensation for the trackage privileges, the copper company agreed to pay to the Nevada Northern a portion of the taxes assessed upon the railroad trackage used, a portion of the expense of roadway operation and maintenance, and a prorata sum, based on the percentage which the copper car miles bears to total car miles, with the object of enabling the Nevada Northern to earn each year an amount equal to 6 percent on the value of the railroad property jointly used by the railroad and the copper company. The trackage contract may be

cancelled by either of the signatory parties upon 60 days' notice in writing.

The copper company acquired from the Nevada Northern a number of locomotives and freight cars which had been utilized, prior to September 1920, in the transportation of ore between Ruth and McGill. All repairs, other than minor and emergency repairs, to the copper company's locomotives and cars which are operated over the line of the Nevada Northern are made at the shop maintained by that railroad at East Ely, but such repairs are not covered by the trackage agreement. The expense of this repair service is borne by the copper company, which keeps on hand a portion of the materials used in repair work. Locomotives and dump cars operated by the copper company at its mines, crushing plant, and smelter, together with mining machinery, are repaired in its own shops at Ruth and McGill.

Some of the workers who had been engaged prior to September 1920 in the transportation of ore from Ruth to McGill were taken over at that time by the copper company, and transferred to its payroll. But to protect the seniority rights of these workers, and to enable them to return to the service of the Nevada Northern, in the event they should desire to return if opportunities were afforded, the railroad granted them leaves of absence, and for approximately 14 years the transferred workers who remained in the ore-line service were carried on two seniority rosters, viz., the seniority record maintained by the railroad, and the similar record established by the copper company. In April 1934 when N. R. A. code and working regulations for employees of industrial organizations were adopted, the transferred workers

who were still in the ore-line service of the copper company were notified that their leaves of absence would be cancelled, and as a consequence the railroad seniority rights and railroad connections of those who elected to remain with the copper company were terminated.

It was understood in 1920, when the ore-line workers were transferred from the Nevada Northern to the copper company, that their basic wage scales would be the same as the scales then applying, or which might thereafter apply, to workers performing similar service for the Nevada Northern, and each transferred worker signed a form of statement providing that ". . . in all matters pertaining to pay, working conditions, and adjustment of questions or disputes, I will be governed strictly by the agreement now in force, or such agreement as may be entered into between the Nevada Northern Railway Company and its employee representative of service to which I may be assigned." Accordingly, whenever deductions or increases have since been made in the basic wage scales of enginemen and trainmen employed by the Nevada Northern, similar deductions and increases have been made in the compensation of the ore-line workers. New employees entering the ore-line service are required to sign a form which states that "in entering the service of the Nevada Consolidated Copper Corporation in their ore transportation service, it is understood that by reason of said service being operated over tracks of the Nevada Northern Railway, I am subject as an employee in such service to the rules and regulations of the Nevada Northern Railway Company. I have been fully advised as to the wage rates in effect by the Nevada Consolidated Copper Corporation as governing said ore service, and conditions pertaining thereto; and in making

application for position of . . . . it is understood that such wage rates and service conditions are satisfactory to me."

After establishment in 1934 of the N. R. A. code, a grievance committee representing the ore-line workers presented to copper company officials a comprehensive document in which they claimed to be engaged in interplant service of the copper company, and in which they manifested a desire that their wages be fixed and dealt with independently and without regard to the wage scales in effect on the Nevada Northern. It appears that this grievance was submitted primarily with the object of securing cancellation of a deduction, made in their wages about April 1932, following a wage deduction made by the Nevada Northern and many other rail carriers. The workers also sought to recover the amounts which had been deducted. At the conference held to discuss the grievance, it developed that each ore-line worker had agreed in writing, as hereinbefore shown, that his wages should be predicated on the basic wage levels in effect on the Nevada Northern, and the grievance was therefore dropped.

The copper company submits reports and makes payments, for account of the ore-line workers, to the Federal Social Security Board, and to the Nevada State Industrial Commission. It also complies with the Federal Fair Labor Standards Act of 1938, which among other things fixes the working periods of certain industrial employees as 8 hours per day and 42 hours per week (40 hours beginning October 1, 1940), and, for additional service, provides for payment of wages at 1½ times the regular rate.[3]

[3]Under the 1938 Fair Labor Standards Act (passed more recently than the Railway Labor Act), the ore-line workers cannot be said to be railway employees unless their employer is a carrier subject to Part I of the Interstate Commerce Act.

Pursuant to an employee operating arrangement, copper company officials notify the railroad dispatcher or trainmaster from time to time respecting the number of carloads of ore wanted at the McGill crushing plant, and, in turn, a railroad official summons a sufficient number of ore-line enginemen and trainmen to transport the tonnage. A railroad officer summons the workers for duty because their home terminal and the principal offices of the railroad are at East Ely, whereas the copper company has no supervisory officials at that point. Ore-line workers report on duty and off duty at East Ely. Written records of working time claimed by each man are transmitted to the Nevada Northern timekeeper, who checks the time against the train sheets maintained by the train dispatcher, and when certified as correct the time records are forwarded to and used by the copper company as bases for semi-monthly checks issued to each worker in payment of wages. A record, showing hours worked daily by each man, is placed in the railroad files to demonstrate to inspectors for the Interstate Commerce Commission that the railroad and the ore-line workers have complied with the Federal Hours of Service Act. Under that statute, any person who operates a train over the line of a common carrier is prohibited from being on duty more than 16 continuous hours, and after being on duty for that period the individual must be relieved and not be permitted to again go on duty until 10 hours have expired.

The expense of services performed by the railroad for the copper company in connection with the trackage agreement and operating arrangement is embodied in bills rendered monthly. As illustrative, bills for February 1939 contained the following items: Copper company proportion of taxes

$2,035.47; rental of ore-line tracks, $3,346.56; material for repairs to ore-line engines $975.33; fuel oil for starting fires, road-locomotive oil and water, $123.86; train, enginehouse, and other supplies $231.50; expense for labor in repairing locomotives, in repairing and inspecting ore cars, and for enginehouse work $4,187.66; coal for locomotives $6,208.51; proportion of store, shop, and enginehouse expense $1,406.54; power consumed in repairing ore-line cars $48.07; proportion of expense directly allocated to joint tracks for maintenance of way, structures, and equipment, for superintendence, train dispatching, station employees, stations, crossing protection, telegraph and telephone operations, $7,782.81; proportion of expense, not directly allocated to joint tracks, for maintenance of way, structures, and equipment, for traffic and transportation superintendence, stationery, salaries of general officers, clerks, etc., $2,552.15. A carrier official testified that its accounts have been checked by representatives of this Commission. The copper company paid 98.8 percent of the maintenance and other expense for February 1939 which was allocated to the ore-line roadway.

Ore-line workers are not granted free or reduced railroad transportation. When ill or injured they are cared for at the expense of the copper company at its Steptoe Valley Hospital, or at one of the emergency hospitals which the copper company maintains at Ruth and McGill. The Steptoe hospital also accepts railway employees, who are ill or injured, upon payment by the railroad of $12 per person per day.

The primary purpose of the Railway Labor Act, as stated therein, is to preclude interruptions to the flow of commerce. With this object in view, rail carriers and their employees subject to the Act are directed to exert every reasonable effort

to make agreements and to settle disputes, concerning rates of pay, rules, and working conditions, by conferences or by other methods detailed in the statute. The Act does not apply to all rail carriers, and whenever there is doubt as to whether a particular carrier is subject to its provisions, this Commission has authority upon receipt of an appropriate petition to hold a hearing, issue a report, and render a decision. A substantial number of such decisions have been entered in proceedings wherein the Commission was asked to determine whether certain electric railroads are carriers, subject to the Railway Labor Act, or whether they are street, suburban or interurban lines and not within the purview of that statute.[4] Also, if there is doubt as to whether or not certain workers are railway employees within the import of the Railway Labor Act, this Commission may upon request conduct a hearing, issue a report, and decide the question. Several such decisions, hereinafter briefly reviewed, have been rendered by divisions of this Commission. These cases are of two classes: First, those in which the Commission was asked to determine whether certain workers are railway employees or railway subordinate officials, as distinguished from higher officials who are not subject to the Railway Labor Act. Second, proceedings relating to workers whose names are not carried on railroad payrolls as employees of individual carriers, but who are hired by employers other than railroads to perform a service said to be connected in one way or another with the transportation of passengers or freight.

Both official and non-official workers who are individually listed on the payrolls of railroad common carriers were

[4]208 I.C.C. 193, 203, 211; 211 I.C.C. 4, 9; 214 I.C.C. 81, 167, 353, 707, 717; 215 I. C. C. 414; 216 I. C. C. 745; 218 I. C. C. 123, 253; 219 I. C. C. 135; and 229 I. C. C. 48.

long ago grouped into designated classes pursuant to orders issued by this Commission, and the number of workers in each class is reported to this Commission regularly in monthly and annual reports.

The first Commission decision pertaining to the Railway Labor Act was entered more than 10 years ago. Thus, in "*Employee Under Railway Labor Act,* 136 I. C. C. 321, decided January 24, 1928, Division 1 found the workers in service of the Trunk Line Association, a carrier agency, to be railway employees. The association is a voluntary organization created and supported by 16 of the larger railroads operating lines in eastern trunk-line territory. All of its expenses, including salaries of personnel, are paid by the member railroads. The association work includes the selling of railroad tickets, consideration of rate matters, issuance of tariffs, supervision of stoppage of freight in transit, supervision of weighing and inspection of shipments, and collection of moneys due carriers. The Commission had previously ruled that workers of some of the classes involved might lawfully be granted free railroad transportation. In *Regulations Concerning Employees Under Ry. Labor Act,* 218 I. C. C. 141, decided August 4, 1936, Division 3 found that signal foremen in service of the Union Pacific Railroad Company northwestern district, and in charge of construction or repair gangs or in charge of a signal repair shop, at salaries of $210 to $215 per month, are no more than subordinate officials, and are railway employees subject to the Railway Labor Act. In *Regulations Concerning Employes Under Ry. Labor Act,* 222 I. C. C. 687, decided June 23, 1937, Division 3 found that the district and division storekeepers of the Chicago & North Western Railway Company are subordinate officials,

and therefore employees subject to the Railway Labor Act. In *Regulations Concerning Employees Under Ry. Labor Act,* 229 I. C. C. 410, 232 I. C. C. 49, Division 3 found that Red-Cap workers who, among other things, carry to or from railway trains the hand baggage of passengers are railway employees. Therein it is said that Red Caps at many railroad stations are paid salaries or wages by railroad companies for the services they perform, although this compensation may be augmented by tips; that their uniforms may be provided in whole or in part by railroads; and that some rail carriers regard them as eligible to lawfully receive free transportation. In *Regulations Concerning Employees Under Ry. Labor Act,* 231 I. C. C. 91, decided December 7, 1938, and not reviewed by the Commission, Division 3 found that several hundred workers employed by Fred Harvey are railway employees within the meaning of the Railway Labor Act. Fred Harvey is a contractor who for many years has served meals in dining cars operated in trains of the Atchison, Topeka & Santa Fe Railway System. In *Regulations Concerning Employees Under Ry. Labor Act,* 232 I. C. C. 44, decided March 29, 1939, Division 3 found that the general yardmasters, terminal trainmasters, trainmasters, and their respective assistants, in service of the Denver & Rio Grande Western Railway at Denver, Pueblo, Grand Junction, and Salida, Colo., and at Salt Lake City and Helper, Utah, are not vested with sufficient authority to stamp them as officials, and are therefore railway employees within the import of the Railway Labor Act, but said that if a general yardmaster at Denver and one at Salt Lake City should be delegated authority to employ, dismiss, or discipline employees, such yardmasters might be

regarded as officials not subject to the Railway Labor Act. In *Regulations Concerning Employees Under Ry. Labor Act,* decided May 9, 1940 (mimeographed), Division 3 found that workers employed by an independent contractor at Superior Wis., and engaged in transferring iron ore from railway cars to a lake dock, and from the dock to steamships operated on the Great Lakes, are not railway employees within the meaning of the Railway Labor Act. None of the decisions, discussed above, deal with conditions which are comparable with those involved in the instant proceeding.

The brotherhoods declare that "the Railway Labor Act is a piece of social legislation designed to accomplish beneficial public ends," and they say that "where a liberal interpretation will result in making the application of the statute co-extensive with the social purpose sought to be achieved, such a liberal interpretation should surely be adopted." Their conception of a liberal interpretation, in the instant proceeding, is a finding that the ore-line workers are Nevada Northern employees. They cite a decision by Division 3, relating to employees of the Fred Harvey dining-car service on the Atchison, Topeka & Santa Fe Railway System, *Regulations Concerning Employees Under Ry. Labor Act,* 231 I. C. C. 91, wherein it is said, at page 98, that the Railway Labor Act "has been recognized as in the highest sense remedial and should be interpreted so as to effectuate its purpose." The brotherhoods declare that the instant case falls squarely within the principle stated in that opinion. The general purposes of the Railway Labor Act are outlined in section 2

thereof and are detailed in the margin.[5] With those purposes and other provisions of the Act to serve as a guide, it seems obvious that each case should be decided on its merits and on the evidence therein. If, as contended, the finding sought by the brotherhoods would be of remedial and beneficial character, it should be possible to point out, or at least to indicate, what particular condition or conditions would be remedied or improved by such finding, and what person or group of persons would be benefited. But neither the evidence nor the briefs herein definitely point to any undesirable working condition on the ore line, nor to any person or group of persons who would be benefited, either socially or otherwise, by the finding sought. On the other hand, there is ground for the belief that such a finding might be very injurious to some or all of the ore-line workers. They apparently have much to lose and nothing to gain. They now receive the same basic wage scales as employees performing similar service for the Nevada Northern. Their hours of labor, as hereinbefore noted, before overtime begins at a higher rate, are 8 hours daily and 42 hours weekly (40 hours after October 1, 1940), pursuant to Federal statute, namely, the Fair Labor Standards Act of

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[5]Sec. 2. The purposes of the Act are (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, and working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

1938, and there is no showing herein that Nevada Northern employees receive overtime wages for all service in excess of 42 hours weekly. As employees of the copper company, the ore-line workers enjoy seniority rights, according to length of service, and this feature seems to be of considerable importance. If it were found that henceforth they will be treated as employees of the Nevada Northern, these seniority rights would at least be partially lost. The workers who head the seniority list on the copper company roster could not hope to be placed at the head of the Nevada Northern roster. As a consequence, those copper company employees who now receive first call when ore-line work is available could not expect to receive first call if they were found to be railroad employees and this ore-line service were transferred to the railroad. The production of copper, and the freight traffic of the Nevada Northern, are subject to wide fluctuations, and in a period when railroad traffic is relatively light this impairment of seniority positions might be a very serious detriment. It might mean the difference between having work to do or being idle. It is to be noted that the ore-line workers are not complaining. The hearing herein was held at Ely, Nevada, near their homes, but none of them offered any testimony.

The brotherhoods attach considerable importance to the fact that the movements of trains operated by the ore-line workers are governed by orders issued by Nevada Northern train dispatchers, and by rules and regulations formulated by officials of that railroad; the fact that persons seeking employment on the ore line are examined, in part, and hired by railroad officials; the fact that ore-line workers are summoned for duty by railroad officials; and the fact that railroad officials are empowered to suspend from work on the

ore line any copper company employee who fails to comply with the afore-mentioned orders, rules, and regulations. As a consequence of these operating practices, the brotherhoods maintain that the ore-line workers are under the supervision and direction of Nevada Northern officials, and are Nevada Northern employees. The copper company claims that the Nevada Northern acts as agent when its officials perform the supervisory and other services above detailed, and points out that those services, paid for each month by the copper company, are rendered by Nevada Northern officials as part of the operating arrangement entered into as a consequence of the trackage agreement which was executed. The statute here under consideration is the Railway Labor Act. In order to be a railway employee within the meaning of that Act, a worker must be in the service of a carrier.[6] The ore-line workers are not in the service of the Nevada Northern, because the work they do is the work of the copper company. The Nevada Northern does not transport the ore tonnage, and is without authority to do so. Hence, the ore-line service cannot accurately be termed the work of a railroad employee.

It is not unusual for a railroad company to operate its freight trains over the line of another rail carrier, either because of a trackage agreement, a detour made necessary by damage to its own line, or a service order issued by this Commission, and while operating over the line of such foreign railroad its train crews must for safety and other considerations be governed by orders, rules, and regulations issued by train dispatchers and other officials of the railroad whose line is being used.

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[6]The definitions of "employee" and "carrier" appearing in the Railway Labor Act are elsewhere reproduced herein.

After examining several court decisions, the brotherhoods declare that where certain individuals are definitely employees, and a question is raised as to which of two parties is their employer, it appears to them that the question must be answered by considering who hires the employees; who pays their wages; who has the power of discharge; and who has the right to control them in the performance of their duties. However, in most of the court cases cited by the brotherhoods, the determining factor seems to be "whose is the work being performed." The hiring, payment of wages, right to control and discharge, are matters which may aid in identifying the employer, but neither of these is conclusive in all instances. According to the weight of judicial authority, the employer is the individual or company whose work is being performed.

Three decisions by the United States Supreme Court are mentioned in the brotherhood brief, and are hereinafter reviewed. Each relates to liability for personal injuries, and neither is directly in point. Nevertheless, the brotherhoods have discussed them, have quoted from them, and apparently rely on them to some extent.

An important and leading case, cited by the brotherhoods, is *Standard Oil Company* v. *Anderson*, 212 U. S. 215, wherein it is explained that while a steamship was being loaded with case oil at Bayonne, N. J., by a gang of longshoremen hired by a contractor, with the aid of a winchman hired by the oil company to operate a hoisting apparatus, a longshoreman named Anderson was injured through negligence of the winchman. The contractor paid the oil company a specified amount to do the hoisting. Anderson sought damages, and the defendant oil company undertook to avoid liability, for negli-

gence of its employee, by contending that the winchman and longshoreman were working for the same employer (the contractor), and were fellow servants. This contention was supported by evidence that the winchman operated the hoist in response to signals given by a member of the contractor's crew, and to that extent his service was directed and controlled by the contractor. However, the court held that the winchman was an employee of the oil company, because operation of the hoist was work which the oil company had undertaken to do, for a price, and it was the oil company's work. The injured longshoreman was an employee of the contractor because he was performing work which the contractor had agreed to do, and in the doing thereof it was the contractor's work. In the instant proceeding, the haulage service performed by the ore-line enginemen and trainmen is the copper company's work, and is not transportation service by the Nevada Northern. Hence, the cited decision does not appear to support the brotherhood contention that the ore-line workers are Nevada Northern employees.

Another citation is *Linstead Co.* v. *Ches. & Ohio Ry.*, 276 U. S. 28, decided February 20, 1928. Therein it is said that a line of the Chesapeake & Ohio Railway Company comes from the east along the southern bank of the Ohio River to a terminal yard at Stevens, Ky., thence westward about 12 miles farther and across the river into Ohio to an interchange point near Cincinnati, where this carrier interchanges freight traffic with the Big Four railroad. Under a reciprocal arrangement between the two railroads, a Big Four train crew operated a Big Four locomotive and caboose from Cincinnati, over the line of the Chesapeake & Ohio, eastward to Stevens, and on the return trip the crew moved cars of freight from

Stevens, over the Chesapeake & Ohio rails, to the aforementioned interchange tracks. While on the Chesapeake & Ohio rails, the Big Four train crew was subject to Chesapeake & Ohio orders, rules, and regulations. The Big Four railroad received nothing for the service performed by its crews on the Chesapeake & Ohio line, except a reciprocal service rendered elsewhere by the latter railroad. The cars movd by the Big Four from Stevens to the interchange yard contained freight for which the Chesapeake & Ohio collected its tariff charges, and which was in the possession and custody of that railroad. While the Big Four crew was operating a train composed of a locomotive, 22 loads, 18 empties, and a caboose over the Chesapeake & Ohio rails, a Cehsapeake & Ohio locomotive crashed into the Big Four caboose and a member of the Big Four crew was killed. In a claim for damages, the court held that the Chesapeake & Ohio was liable. The decision was supported by a finding that the Big Four crew was doing Chesapeake & Ohio work, and that the crew members were at that particular time employees of the Chesapeake & Ohio within the meaning of the Employers' Liability Act. The rule of law enunciated does not appear to support the brotherhood view that the ore-line workers are not performing Nevada Northern work when they operate trains over the jointly used tracks, the Nevada Northern does not collect tariff charges for the movement of this tonnage, nor is that carrier in possession and custody of the tonnage.

Denton v. *Yazoo & M. V. R. Co.*, 284 U. S. 305, also cited by the brotherhoods, was decided January 4, 1932, and pertains in part to a station porter named Hunter who was hired and paid by the Illinois Central Railroad Company. This carrier transports United States mail, and was required by

a government regulation to furnish the men necessary to load the mails into and receive them from the doors of railway post office cars. While engaged at Jackson, Miss., in transferring United States mail bags from a platform truck to a mail car, under the direction of a United States postal transfer clerk, Hunter handled the mail bags in such manner that a postal employee working in the car was injured, and in a legal proceeding by the injured worker to recover damages, the Supreme Court held that the Illinois Central was not liable for the negligence of Hunter because he was doing government work when the postal employee was injured; that the statutory obligation imposed upon rail carriers is simply to transport mail offered for transportation by the United States; that they are not required to load or receive mail matter, but only to furnish the men necessary for those purposes. The court said it is elemental that when one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as the servant of the latter and not of the former; and that in determining whether a given case falls within one class or the other, inquiry should be made to ascertain whose work is being performed, and cited *Standard Oil Co.* v. *Anderson,* 212 U. S. 215; *Linstead* v. *Chesapeake & Ohio Ry. Co.,* 276 U. S. 28; *Harrell* v. *Atlas Portland Cement Co.,* 250 Fed. 83, 85; *Brady* v. *Chicago & G. W. Ry. Co.,* 114 Fed. 100, 107; *Wyllie* v. *Palmer,* 137 N. Y., 248, 257; 33 N. E. 381; *Higgins* v. *Western Union Telegraph Co.,* 156 N. Y. 75, 78; 50 N. E. 500; *Cotter* v. *Lindgren,* 106 Cal. 602, 607; 39 Pac. 950; *Rourke* v. *White Moss Colliery Co.,* L. R. 2 C. P. Div. (1876-1877) 205. The rule of law applied does not appear

to support the brotherhood view that the ore-line workers are Nevada Northern employees, because those individuals are not performing Nevada Northern work.

The copper company and the Nevada Northern contend that the Railway Labor Act does not apply to the ore-line workers, because the services in which they are engaged is not carriage for hire, and, according to their view, is not transportation in the sense in which this word is used in the Railway Labor Act, but is merely haulage by an industry of its own crude ore, in its own vehicles, from points near its own mines, to a yard near its own plant where the material is crushed and approximately one ton of copper concentrates extracted from each 25 tons of ore. Section 1, first paragraph, of the Railway Labor Act, defines the term "carrier" as any—

> . . . carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad, and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation . . . and handling of property transported by railroad . . .

The copper company maintains that it is not a carrier by railroad, subject to the Interstate Commerce Act; that it does not perform a service in connection with the handling of property transported by railroad; and therefore that it is not a carrier within the meaning of the Railway Labor Act.

Among the court decisions cited by the copper company, in support of its contention that the ore movement is not connected with railroad transportation, is *Penna. R. Co.* v. *Public Utility Comm'n.*, 298 U. S. 170, decided April 27, 1936, which pertains to the haulage of coal by a coal company from its

mines in the State of Pennsylvania in its own cars to a landing on the Monongahela River in that State; thence in its own barges down stream to an Ohio River landing in Pennsylvania; thence with its own motive power and cars over its own track a distance of about 11 miles to Negley, Ohio, where the coal was dumped, washed, broken up or assorted into sizes, and shipped intrastate over the lines of common carriers by railroad to destinations in Ohio. It was held that common-carrier transportation began when the coal was placed in possession of a railroad company at Negley, and that the private carriage from Pennsylvania to the Negley washing plant could not be tacked to the railroad transportation from that point, and the latter haul treated as part of an interstate movement from Pennsylvania to Ohio.

The provisions of the Railway Labor Act are of a positive and definite character. The line of demarcation between individuals who are railway employees, and those who are not railway employees, is quite sharp and clear.

To be a railway employee within the meaning of the Railway Labor Act, the worker must be in the service of a carrier. A rail carrier is defined by the Railway Labor Act as a railroad which is subject to the Interstate Commerce Act. The Nevada Northern Railway is a carrier of that type, but the copper company is not. The Railway Labor Act also applies to a company which is under the same control as a rail carrier, provided such company performs a service in connection with the handling of property which is transported by railroad. The Nevada Northern and the copper company are under common control, but the copper company does not haul property which is transported by the railroad. The ore

which is hauled by the copper company goes from the mines to the mill where it is crushed, and where about one ton of copper concentrates is extracted from each 25 tons of ore. The concentrates are then taken to a nearby smelter where they are melted, the impurities removed, and the metal converted into copper bars. It is these copper bars which are transported by the Nevada Northern on published tariff rates. Hence, it seems clear that the copper company is not a carrier, as that term is defined by the Railway Labor Act.

Inasmuch as the copper company is not a carrier, within the meaning of the Railway Labor Act, the only way the ore-line workers can legally be classified as railway employees is to find that they are in the service of the Nevada Northern. The work these men do is to move trainloads of crude ore in one direction, and trains of empty cars in the other. The ore is hauled by the use of locomotives and cars owned by the copper company, and by workers paid by that company. The ore trains pass over about 22 miles of Nevada Northern track which is used by the copper company under a trackage agreement that was executed about 19 years ago. Under this arrangement, the copper company pays a proportionate share of the taxes, roadway maintenance expense, and other operating expenses which are allocated to the 22 miles of track, and the accounting records pertaining thereto have been approved by this Commission. To hold that the ore-line workers are in the service of the Nevada Northern, it must be found that the movement of the ore trains is railroad transportation service which is performed by that carrier. And it cannot accurately be said as a matter of fact or as a matter of law, that the ore tonnage is moved by the Nevada Northern. At no time does this carrier have actual possession, or legal

possession, or custody of the ore tonnage. At no time does it transport, or have authority to transport that tonnage. It follows that the ore-line workers are not in the service of, and are not employees of, the Nevada Northern.

Several years ago the Nevada Northern and the copper company entered into a employee operating agreement, and some question has arisen as to what effect, if any, this arrangement has upon the legal status of the ore-line enginemen and trainmen. Under that agreement, certain Nevada Northern officials performs what might be termed a dual or joint service, since they act as operating officers in respect of traffic handled by the Nevada Northern under line-haul rates, and, in addition, they do certain supervisory work for the copper company, i.e., they issue train dispatching orders governing copper company ore trains which are moved over Nevada Northern rails under trackage rights; they have authority to select and hire new ore-line enginemen and trainmen, after the physical qualifications of the applicants have been approved by the copper company; they instruct ore-line workers with respect to rules and regulations which apply to persons who operate trains over Nevada Northern rails; and they have authority to suspend from work, on ore-line trains, enginemen and trainmen who fail to comply with those operating rules and regulations. These operating officials receive their entire salaries from the Nevada Northern, but the proportion of their time which is devoted to supervisory work for the copper company is recorded, and monthly bills for such service are rendered against and paid by the copper company. Hence, as a matter of form these operating officials are in the employ of the Nevada Northern. As a matter of substance, a portion of their time is devoted to copper com-

pany work and the copper company pays for that service. The ore-line enginemen and trainmen devote all their working time to ore haulage for the copper company, and, as a matter of both form and substance, they are in the service of that company. Their legal status, as copper company employees, is in no wise changed by the circumstance that certain Nevada Northern officials render supervisory services for both companies. From the standpoint of safety, it obviously is desirable that train dispatching orders and operating rules be issued by one group of officials.

Counsel for the participating parties entertain different views concerning the meaning of Section 1, Paragraph 5, of the Railway Labor Act. This paragraph, recited elsewhere herein and not yet construed by the courts, defines the term employee, and it appears from the definition that an individual may be in the service of a rail carrier and still not be an employee within the meaning of the Railway Labor Act. That statute provides three tests by which to identify the workers who are subject to its provisions. First, the individual must be in the service of a carrier. Second, the carrier must have continuing authority to supervise the service which the individual renders. Third, the work which the individual performs must be defined by this Commission as the work of a railroad employee or subordinate official. To be an employee within the meaning of the Railway Labor Act, an individual must pass all three tests. The ore-line workers involved in the instant proceeding are not even employees under the first test, because they are not in the service of a carrier as that term is defined by the Railway Labor Act. Nor are they railway employees within the meaning of the 1938 Fair Labor Standards Act.

On brief the brotherhoods assert that the question presented involves more than the application of abstract legal rules to a general legal problem, and they emphasize their contention that the Railway Labor Act is intended to accomplish beneficial results, but they make no attempt to show that the finding they seek would be beneficial to the ore-line enginemen and trainmen in respect of hours of service, wages, working conditions; sick benefits, old-age pensions, seniority rights, or otherwise. There is but little evidence of record concerning these matters. Such evidence as was introduced indicates that the finding sought by the brotherhoods would be injurious to the ore-line workers.

The Commission should find that the enginemen and trainmen here involved whose wages are paid by a copper company and who are engaged in operating trains of empty and loaded freight cars, owned by that company, over tracks owned by the Nevada Northern Railway Company and used by the copper company under trackage rights, have not been shown to be railway employees within the meaning of the Railway Labor Act.

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CITATION

Statute:

Railroad Retirement Act, as amended, 50 Stat. 307, 54 Stat. 264, 785, 786, 45 U. S. C. Sec. 228a; 50 Stat. 314, 45 U. S. C. Sec. 228j; 50 Stat. 315, 45 U. S. C. Sec. 228k:

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495737—42

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 478

NEVADA CONSOLIDATED COPPER CORPORATION, NEVADA NORTHERN RAILWAY COMPANY, AND KENNECOTT COPPER CORPORATION, PETITIONERS

v.

RAILROAD RETIREMENT BOARD, RAILROAD LABOR EXECUTIVES ASSOCIATION, AND BROTHERHOOD OF RAILROAD TRAINMEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RAILROAD RETIREMENT BOARD

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Tenth Circuit (R. 433) is reported in 129 F. (2d) 358. The opinion of the District Court of the United States for the District of Colorado (R. 80) is reported in 41 F. Supp. 763.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 27, 1942 (R. 442). A petition for rehearing was denied August 11, 1942 (R. 451). The petition for a writ of certiorari was filed on October 22, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether certain persons engaged in transporting ore by the use of facilities of a common carrier were properly determined by the Railroad Retirement Board to be "employees" of the carrier within the meaning of that term in Section 1 (b) of the Railroad Retirement Acts of 1935 and 1937, as amended (50 Stat. 307, 54 Stat. 264, 45 U. S. C. Sec. 228a).

STATUTE INVOLVED

The pertinent provisions of the Railroad Retirement Act of 1937, as amended, appear in the Appendix.

STATEMENT

Petitioner Nevada Northern Railway Company was organized as a common carrier and its facilities were constructed primarily to provide transportation for the ores of its parent (the predecessor of petitioner Nevada Consolidated Copper Corporation) (R. 189, 190, 191,

197). From the beginning of operations in 1908 until September 1, 1920, the railway company transported the ores under public tariffs and the individuals employed in this transportation were employees of the railway company (R. 218, 219). However, on or about September 1, 1920, for the admitted purpose of avoiding the application of the recapture provision of section 15a of the Interstate Commerce Act to the excess income of the railway company, the predecessor copper company took title to the ore hauling equipment and entered into an agreement dated May 28, 1920, with the subsidiary railway company which purported to grant to the copper company the right to conduct the ore transportation then being performed by the railway company (R. 272, 273). As a result of the agreement the copper company was substituted as the maker of the pay checks of the individuals employed in this service, but no substantial change occurred in the conduct of ore transportation operations. The same railroad officers and employees who before the execution of the agreement had instructed the men engaged in this ore transportation as to the work to be done, and the manner and means of performing it, and who had engaged these men for service or discharged or disciplined them, continued after the execution of the agreements to exercise the same functions with respect to the same men (R. 202, 203, 205,

206, 219). The entire ore movement of the railroad continued to be under the complete control and supervision of the officers and employees of the railway company (R. 202, 203, 205, 206, 219).

A number of the individuals employed after September 1, 1920, in the ore transportation service on the railroad filed with the respondent Railroad Retirement Board applications for annuities under the Railroad Retirement Acts, claiming that their service in such ore transportation was creditable under the Railroad Retirement Acts as service to a covered employer (R. 180; Ex. 2, R. 316–318). The Board ordered a hearing before an examiner, such a hearing was held, full opportunity was given to all interested parties to present evidence and arguments, the examiner issued a report, exceptions were filed, and a Board decision was rendered on the basis of the evidence and arguments presented (R. 26, 89, 127, 178, 180; Ex. 1, R. 314). The Board found that the individuals employed after September 1, 1920, in transporting ore on the railroad of the petitioner Nevada Northern Railway Company were "in the service" of the railway company (Section 1 (c)), and therefore were "employees" of the railway company within the meaning of Section 1 (b) of the Acts (R. 41).

Petitioners then brought suit in the District Court of the United States for the District of Colorado under Section 11 of the Railroad Retire-

ment Act of 1937 (50 Stat. 307, 315, 45 U. S. C. Sec. 228k) to set aside the Board's decision. The District Court held that in reviewing Board decisions under Section 11 of the Railroad Retirement Act of 1937, the authority of the court is limited to the question whether the Board's decision was arbitrary or capricious or unsupported by substantial evidence; and upon finding that there had been a full and fair hearing before the Board, and that the record before the Board contained substantial evidence in support of the decision, the court dismissed the suit (R. 80–86). The United States Circuit Court of Appeals for the Tenth Circuit affirmed the judgment of the District Court, but on different reasoning. The Circuit Court of Appeals stated that a reviewing court is not bound by the Board's decision as to the employee status of the workers involved, and that the District Court had committed "error in dismissing the proceedings on the ground that the decision of the Board in this respect was final because supported by competent evidence" (R. 438). The court found as an independent proposition, however, that the workers engaged in ore haulage were "employees" of the railway company (R. 433–442).

DISCUSSION

As appears from the foregoing statement, except for the fact that this case does not present any issue as to the creditability of service rendered

by copper company employees in railroad repair shops, the facts and issues in this case do not differ materially from those in the companion *Utah Copper Company* case, No. 479. The Argument in the Government's memorandum in the *Utah* case, filed concurrently herewith, is applicable to the case at bar, and no useful purpose would be served by repeating it here.

CONCLUSION

We respectfully submit that the decision of this Court as to whether certiorari should be granted in the *Utah* case should control in this case.

CHARLES FAHY,
Solicitor General.

JOSEPH H. FREEHILL,
General Counsel.

A. MORRIS KOBRICK,
Attorney,
Railroad Retirement Board.

NOVEMBER 1942.

APPENDIX

The pertinent provisions of the Railroad Retirement Act of 1937, as amended, are as follows:

Section 1 (50 Stat. 307, 54 Stat. 264, 785, 786, 45 U. S. C. Sec. 228a):

> (a) The term "employer" means any carrier (as defined in subsection (m) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer * * *.
>
> (b) The term "employee" means (1) any individual in the service of one or more employers for compensation, (2) any individual who is in the employment relation to one or more employers, and (3) an employee representative * * *.
>
> (c) An individual is in the service of an employer whether his service is rendered within or without the United States if he is subject to the continuing authority of the

employer to supervise and direct the manner of rendition of his service, which service he renders for compensation * * *.

* * * * *

(h) The term "compensation" means any form of money remuneration earned by an individual for services rendered as an employee to one or more employers * * *.

* * * * *

(m) The term "carrier" means an express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act.

Section 10 (50 Stat. 314, 45 U. S. C. Sec. 228j):

(b) 1. The Board shall have and exercise all the duties and powers necessary to administer this Act and the Railroad Retirement Act of 1935. The Board shall take such steps as may be necessary to enforce such Acts and make awards and certify payments. Decisions by the Board upon issues of law and fact relating to pensions, annuities, or death benefits shall not be subject to review by any other administrative or accounting officer, agent, or employee of the United States.

2. If the Board finds that an applicant is entitled to an annuity under the provisions of this Act or the Railroad Retirement Act of 1935 then the Board shall make an award fixing the amount of the annuity and shall certify the payment thereof as hereinafter provided; otherwise the application shall be denied.

3. The Board shall from time to time certify to the Secretary of the Treasury the name and address of each individual entitled to receive a payment, the amount of such payment, and the time at which it should be

made, and the Secretary of the Treasury through the Division of Disbursements of the Treasury Department, and prior to audit by the General Accounting Office, shall make payment in accordance with the certification by the Board.

4. The Board shall establish and promulgate rules and regulations to provide for the adjustment of all controversial matters arising in the administration of such Acts, with power as a Board or through any member or designated subordinate thereof, to require and compel the attendance of witnesses, administer oaths, take testimony, and make all necessary investigations in any matter involving annuities or other payments and shall maintain such offices, provide such equipment, furnishings, supplies, services, and facilities, and employ such individuals and provide for their compensation and expenses as may be necessary for the proper discharge of its functions * * *.

5. The Board is authorized to delegate to any of its employees the power to make decisions on applications for annuities or death benefits in accordance with rules and regulations prescribed by the Board: *Provided, however,* That any person aggrieved by a decision so made shall have the right to appeal to the Board.

Section 11 (50 Stat. 315, 45 U. S. C. Sec. 228k):

An employee or other person aggrieved may apply to the district court of any district wherein the Board may have established an office or to the District Court of the United States for the District of Columbia to compel the Board (1) to set aside an action or decision of the Board claimed to be in violation of a legal right of the applicant

or (2) to take action or to make a decision necessary for the enforcement of a legal right of the applicant. Such court shall have jurisdiction to entertain such application and to grant appropriate relief. The decision o fthe Board with respect to an annuity, pension, or death benefit shall not be subject to review by any court unless suit is commenced within one year after the decision shall have been entered upon the records of the Board and communicated to the person claiming the annuity, pension, or death benefit. The jurisdiction herein specifically conferred upon the Federal courts shall not be held exclusive of any jurisdiction otherwise possessed by such courts to entertain actions at law or suits in equity in aid of the enforcement of rights or obligations arising under the provisions of this Act or the Railroad Retirement Act of 1935.

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